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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JAMES LINTZ, a/k/a "Zuke," )  
 )  
Defendant. )

No. CR 08-0298 SI

**UNITED STATES' OPPOSITION TO  
DEFENDANT'S MOTION TO  
SUPPRESS**

Date: August 22, 2008  
Time: 11:00 a.m.

The United States hereby files its response to defendant's motion to suppress physical evidence (*i.e.*, the loaded Mossberg 500A shotgun, with an altered and unreadable serial number, that was found on defendant's person on March 24, 2008). As set forth below, the defendant's motion to suppress should be denied in its entirety. Contrary to defendant's position, both the vehicle stop and the seizure and search of the defendant during that vehicle stop were valid under clearly established Fourth Amendment precedent.

An evidentiary hearing has not been scheduled in this case, and the government therefore does not plan to call any witnesses at the argument on this motion that is scheduled for August

22, 2008. Because there are no material facts in dispute, an evidentiary hearing is not required.

### BACKGROUND

On March 24, 2008, plainclothes officers were searching the streets around Hudson and Ardath in the Bayview area of San Francisco due to an anonymous report of a black male in a vehicle waiting to kill a victim of a prior shooting. *See* Exhibit A, Declaration of Jason F. Kirchner in Support of Government's Opposition to Defendant's Motion to Suppress, at ¶ 2. As the officers drove southbound on Hudson near Ardath Court, they were passed by a Jeep with a driver side brake light out. *Id.*<sup>1</sup> One of the officers (Officer Coleman) spotted the traffic violation and followed the Jeep northbound on Hudson towards Reuel Court. *Id.* ¶ 3. Officer Coleman, who was driving, activated the undercover car's red light but did not turn on the siren. The Jeep, in which a male driver and three male passengers were riding, stopped almost immediately as it turned right onto Reuel Court. Officer Coleman pulled the undercover car in behind the Jeep. *Id.*

As the undercover car stopped, Officer Kirchner exited from the front right passenger seat. *Id.* ¶ 4. As he approached the Jeep, the occupant of the rear passenger side seat, later identified as the defendant James Lintz, exited the vehicle and began to walk away. *Id.* Lintz was carrying a heavy camouflage coat in his left hand and wearing bulky, loose clothing capable of concealing a firearm. Officer Kirchner was suspicious of Lintz's hasty exit from the vehicle and suspected he had something illegal on his person. Lintz took several steps but got no more than 20 feet away from the car. Officer Kirchner was very concerned about officer safety with three men inside the Jeep and one man outside of it. *Id.*

Officer Kirchner called out to Lintz and told him to stop and to get back into the car. Lintz hesitated, looked at Officer Kirchner, then walked back to the vehicle quickly. Officer Kirchner allowed him to get back into the vehicle without searching him because the officer thought it was safer that way. Lintz entered through the open rear passenger side door, which

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<sup>1</sup> Although in Officer Kirchner's original police report, he had indicated that it was a tail light that was out, that was a typographical error. In fact, it was a brake light that was not functioning. Exhibit A ¶ 2.

1 remained open throughout the incident. *Id.* ¶ 5.

2 As soon as he sat down in the Jeep, Lintz appeared to be nervous and immediately  
3 reached for his left waistband area with one or both hands. Officer Kirchner believed Lintz was  
4 reaching for a gun. *Id.* ¶ 6.

5 Officer Kirchner ordered Lintz to “Keep your hands where we can see them!” Lintz  
6 complied only briefly, then reached for his left waistband area again. He did this three or four  
7 times. *Id.* ¶ 7. Each time that Lintz reached for his waist again, Officer Kirchner became more  
8 concerned for the officers’ safety and yelled louder at Lintz to put his “Hands up! Now!” *Id.* at  
9 8. During this time, Officer Kirchner noticed Officer Scott standing next to him and also yelling  
10 at Lintz to show the officers his hands. At some point, fearing for their safety, the officers drew  
11 their guns. *Id.* ¶ 8.

12 By the fourth time Lintz reached for his waist, Officer Kirchner realized it was too  
13 dangerous to leave him in the car and he had to be removed and searched. *Id.* ¶ 9. Officer  
14 Kirchner ordered Lintz “Out of the car with your hands up!” Once he was out of the car, Officer  
15 Kirchner saw the receiver of a shotgun in Lintz’s waistband. Officer Scott removed the shotgun  
16 as Officer Kirchner controlled Lintz’s hands. Once the shotgun was removed, Lintz was  
17 handcuffed. *Id.* ¶ 10-11.<sup>2</sup>

18 At that point, the officers removed and detained the driver of the vehicle, Charles Toney,  
19 and two other passengers in order to ensure officer safety. A search of the vehicle for additional  
20 contraband was then conducted with negative results. Officer Kirchner inspected the gun and  
21 found two live 12 gauge shells in the magazine of the shotgun. All suspects, evidence, and the  
22 vehicle were transported to Bayview Station for further investigation. *Id.* ¶ 13.

23 At the station, Officers Scott and Ellis Mirandized and interviewed Lintz. During the  
24 videotaped interview, Lintz admitted to possessing the firearm in the vehicle, concealing it on his  
25 person, knowing that it was loaded, and knowing that the gun had been cut down. He said he  
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27 <sup>2</sup> The shotgun was shorter than the legal length. The serial number of the gun had also  
28 been scratched off.

1 found it near Ardath Court and brought it in the car with him when he got a ride from his friend.  
2 *Id.* ¶ 14.

### 3 DISCUSSION

#### 4 I. The Vehicle Stop Was Valid.

5 The vehicle stop was valid under the Fourth Amendment. As explained above and in  
6 Officer Kirchner's attached declaration, the Jeep in which the defendant was riding as a  
7 passenger had a broken brake light on the driver's side. The officers therefore had an objectively  
8 reasonable suspicion that the driver of the car, Mr. Toney, had committed a traffic violation. In  
9 such a case, it is entirely valid under the Fourth Amendment for officers to stop the car. *See*  
10 *United States v. Pulliam*, 405 F.3d 782, 787 (9<sup>th</sup> Cir. 2005) ("The malfunctioning taillight  
11 provided lawful grounds for the stop, regardless of the officers' motivations.").

#### 12 II. The Seizure and Search of the Defendant Was Valid.

13 The seizure and search of the defendant was also lawful under the Fourth Amendment. It  
14 is well established that an officer may order a passenger who voluntarily gets out of a lawfully  
15 stopped vehicle back into the automobile without violating the passenger's Fourth Amendment  
16 rights. *See United States v. Williams*, 419 F.3d 1029, 1030 (9<sup>th</sup> Cir. 2005). Thus, contrary to the  
17 defendant's argument, "a passenger's compliance with an officer's command to get back into the  
18 car in which the passenger had just exited is not an unreasonable seizure under the Fourth  
19 Amendment." *Id.* at 1031.

20 The defendant attempts to change this case from one of a lawful traffic stop in which a  
21 passenger is told to remain inside a car, clearly controlled by *Williams*, into a case of  
22 independently stopping a person on the street. The defendant claims that "[b]efore the police  
23 could make the U-turn and stop Mr. Toney's car, . . . Mr. Toney pulled his car onto Reuel Court  
24 and stopped to let Mr. Lintz get out." Motion, at 2. According to the defendant, "[a]t that point,  
25 Mr. Lintz got out of the car and began to walk away from the car. When he was about 10 feet  
26 from Mr. Toney's car, the police pulled up behind the Mr. Toney's [sic] car and activated their  
27 emergency lights." Motion, at 2 (citations omitted). Even if those facts were accurate, however,  
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1 it does not change the legal analysis here.

2 As the *Williams* court explained, “The touchstone of our analysis under the Fourth  
3 Amendment is always the reasonableness in all the circumstances of the particular governmental  
4 invasion of a citizen’s personal security.” 419 F.3d at 1031 (quoting *Pennsylvania v. Mimms*,  
5 434 U.S. 106, 108-09 (1977)). In upholding the officers’ decision in that case to order a  
6 passenger to get back into the vehicle during a traffic stop, the *Williams* court emphasized “the  
7 officer’s discretion to control the situation *as he or she deems necessary to ensure the safety* of  
8 the officer and the vehicle occupants.” *Id.* at 1030. That reasoning controls the present case.

9 When stopping a car on the street and ordering a passenger to remain inside for officer  
10 safety reasons, it does not matter whether the passenger exited the car exactly when officers  
11 stopped the car or – as the defendant claims to be the case here – moments before, when the  
12 police were about to stop the car. In either situation, the officers must have the latitude to control  
13 the scene of the traffic stop in order to protect officer safety. For that reason, the *Williams* court  
14 acknowledged that “[g]iving officers the authority to control *all movement* in a traffic encounter  
15 is sensibly consistent with the public interest in protecting their safety.” *Id.* at 1034 (emphasis  
16 added). Here, the minimal intrusion of asking the defendant to return to the automobile, even if  
17 he was some feet away from the car by that point, was far outweighed by the need to protect  
18 officer safety in a dynamic and inherently dangerous situation. *See id.* at 1032 (noting statistics  
19 set forth in *Maryland v. Wilson*, 519 U.S. 408, 410 (1997), documenting assaults and homicides  
20 on officers while enforcing traffic laws). *See also Brendlin v. California*, 127 S. Ct. 2400, 2407  
21 (2007) (“It is also reasonable for passengers to expect that a police officer at the scene of a crime,  
22 arrest, or investigation will not let people move around in ways that could jeopardize his  
23 safety.”).

### 24 **III. An Evidentiary Hearing Is Unwarranted.**

25 The defendant appears to assume that this Court’s hearing of this motion on August 22,  
26 2008 will be an evidentiary hearing with witnesses. It is undersigned counsel’s understanding  
27 that this Court intended only to schedule oral argument on the motion for that date. In any event,  
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1 the defendant has not established any need for an evidentiary hearing. "An evidentiary hearing  
2 on a motion to suppress need be held only when the moving papers allege facts with sufficient  
3 definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of  
4 fact exist." *United States v. Howell*, 231 F.3d 615, 620 (9<sup>th</sup> Cir. 2000). Here, there are no  
5 contested issues of material fact. The attached affidavit of Officer Kirchner, which describes the  
6 search, appears to be entirely consistent with the defendant's account of the search, except for  
7 one non-material fact. The defendant appears to claim that he was already out of the car when  
8 the undercover car actually pulled in behind the Jeep. Even if that were true, it does not affect  
9 one iota the legal analysis or the officer safety concerns discussed above. In a traffic stop where  
10 there are three men inside a car and one man some feet outside it, officers need to have the  
11 latitude to control the situation regardless of the precise timing of when one of the men exited the  
12 car. Thus, any request by the defendant for an evidentiary hearing should be denied.

13  
14 DATED: July 25, 2008

15  
16 Respectfully submitted,

17 JOSEPH P. RUSSONIELLO  
18 United States Attorney

19 \_\_\_\_\_  
/s/

20 ERIKA R. FRICK  
21 Assistant United States Attorney  
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9 Attorneys for Plaintiff

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 JAMES LINTZ, a/k/a "Zuke,"

18 Defendant.  
19

No. CR 08-0298 SI

DECLARATION OF JASON F.  
KIRCHNER IN SUPPORT OF  
GOVERNMENT'S OPPOSITION TO  
DEFENDANT'S MOTION TO SUPPRESS

20 I, JASON F. KIRCHNER, do hereby declare:

- 21 1. I am an Officer with the San Francisco Police Department ("SFPD") and have been so  
22 employed since 2002. I have worked in uniform and plainclothes patrols. For the past  
23 three years, I have been assigned to the Bayview Police District working mostly in  
24 plainclothes capacity. I have made or participated in hundreds of arrests for the illegal  
25 possession of firearms.
- 26 2. On March 24, 2008, at 15:52 hours, I was in plainclothes in an unmarked police vehicle  
27 with three other officers. We were searching the area of Hudson and Ardath due to an  
28 anonymous report of a black male in a vehicle waiting to kill a victim of a prior shooting.

DECLARATION  
[CR 08-0298 SI]

1 As we drove southbound on Hudson near Ardath Court, we were passed by a Jeep with a  
2 driver side brake light out. Although in my original police report, I had indicated that it  
3 was a tail light that was out, that was a typographical error. In fact, it was a brake light  
4 that was not functioning.

5 3. One of the other officers (Officer Coleman) spotted the traffic violation and followed the  
6 vehicle northbound on Hudson towards Reuel Court. Officer Coleman activated the  
7 undercover car's red light but did not turn on the siren. The Jeep, in which a male driver  
8 and three male passengers were riding, stopped almost immediately as it turned right onto  
9 Reuel Court. Officer Coleman pulled the undercover car in behind the stopped Jeep.

10 4. As our undercover car stopped, I exited the car from the front right passenger seat, where  
11 I had been sitting. As I approached the Jeep, the occupant of the rear passenger side seat,  
12 later identified as James Lintz, exited the vehicle and began to walk away. Lintz was  
13 carrying a heavy camouflage coat in his left hand and wearing bulky, loose clothing  
14 capable of concealing a firearm. I was suspicious of Lintz's hasty exit from the vehicle  
15 and suspected he had something illegal on his person. Lintz took several steps but got no  
16 more than 20 feet away from the car. I was very concerned about officer safety with three  
17 men inside the vehicle and one man outside of it.

18 5. I called out to Lintz and told him to stop and to get back into the car. Lintz hesitated,  
19 looked at me, then walked back to the vehicle quickly. I allowed him to get back into the  
20 vehicle without searching him because I thought it was safer that way. Lintz entered  
21 through the open rear passenger side door, which remained open throughout the incident.

22 6. As soon as he sat down in the Jeep, Lintz appeared to be nervous and immediately  
23 reached for his left waistband area with one or both hands. My first thought was that he  
24 was reaching for a gun.

25 7. I ordered Lintz to "Keep your hands where we can see them!" He complied only briefly,  
26 then reached for his left waistband area again. He did this three or four times.

27 8. Each time he reached for his waist again, I became more concerned for our safety and  
28 yelled louder at Lintz to put his "Hands up! Now!"

DECLARATION  
[CR 08-0298 SI]



- 1 9. During this time, I noticed Officer Scott standing next to me and also yelling at Lintz to  
2 show us his hands. At some point, fearing for our safety, we drew our guns.  
3 10. By the fourth time Lintz reached for his waist, I realized it was too dangerous to leave  
4 him in the car and he had to be removed and searched.  
5 11. I ordered Lintz "Out of the car with your hands up!" Once he was out of the car, I saw  
6 the receiver of a shotgun in Lintz's waistband. Officer Scott removed the shotgun as I  
7 controlled Lintz's hands. Once the shotgun was removed, I handcuffed Lintz.  
8 12. The shotgun was shorter than the legal length. The serial number of the gun had also  
9 been scratched off.  
10 13. At that point, we removed and detained the driver of the vehicle, Charles Toney, and two  
11 other passengers in order to ensure officer safety. A search of the vehicle for additional  
12 contraband was then conducted with negative results. I inspected the gun and found two  
13 live 12 gauge shells in the magazine of the shotgun. All suspects, evidence, and the  
14 vehicle were transported to Bayview Station for further investigation.  
15 14. At the station, Officers Scott and Ellis Mirandized and interviewed Lintz. During the  
16 videotaped interview, Lintz admitted to possessing the firearm in the vehicle, concealing  
17 it on his person, knowing that it was loaded, and knowing that the gun had been cut  
18 down. He said he found it near Ardath Court and brought it in the car with him when he  
19 got a ride from his friend.

20  
21 I declare under penalty of perjury that the foregoing is true and correct. Executed this  
22 25<sup>th</sup> day of July 2008, at San Francisco, California.

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24   
25 OFFICER JASON F. KIRCHNER  
26  
27  
28

DECLARATION  
[CR 08-0298 SI]